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IN THE

# Supreme Court of the United States

OCTOBER TERM 1940.

No. 741

KLAXON COMPANY,

*Petitioner,*

vs.

STENTOR ELECTRIC MANUFACTURING COMPANY, INC.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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KLAXON COMPANY,

*Petitioner,*

vs.

STENTOR ELECTRIC MANUFACTURING COMPANY, INC.

---

## Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

James D. Carpenter, Jr., on behalf of Klaxon Company prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Third Circuit entered in the above entitled cause October 24, 1940.

### OPINIONS BELOW.

The opinion of the District Court is reported at 30 Fed. Supp. 425 (Apt. App. 45-67).

The opinion of the Circuit Court of Appeals is reported at 115 F. (2d) 268.

### JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on October 24, 1940.

Petitioner duly filed a petition for rehearing which was denied November 15, 1940.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

## Questions Presented.

(1) Whether a provision of the New York Civil Practice Act regarding moratory interest is applicable to an action in the Federal District Court for Delaware?

(2) Whether a Federal District Judge may add $60,000 of moratory interest to a verdict for $100,000, where damages were highly uncertain both as to amount and date of accrual and where there was no means of determining whether the verdict as rendered included interest?

(3) Whether a dissolved corporation is a "citizen" within the intent and meaning of Section 24 of the Judicial Code, and entitled to sue in a District Court of the United States for a breach of contract that occurred after dissolution.

(4) Whether the figures of the U. S. Census of Manufacturers as to the gross sales of all types of Radio Receivers in the nation for three years may be used by a witness in a Federal Court as the basis for an estimate of the number of radio receivers of a special patented type that a particular manufacturer, who had never made a single radio receiver, could have sold over a six year period?

## Statutes Involved.

The pertinent statutes are set forth in the Appendix, *infra,* pages 17-20.

## Statement.

On June 1, 1929, plaintiff, Stentor Electric Manufacturing Company, Inc., instituted in its corporate name an action against Klaxon Company in the United States District Court for the District of Delaware. Damages were

claimed for breach of covenant by Klaxon to use its best efforts to further the manufacture and sale of certain patented devices covered by an agreement dated May 20, 1918.

Plaintiff, Stentor Electric Manufacturing Company, Inc., was voluntarily dissolved by filing with the Secretary of State of the State of New York a certificate of dissolution on January 7, 1919 (Ex. P-137, Apt. App. 325) and a corrected certificate of dissolution on May 16, 1919 (Apt. App. 335).

Defendant filed a plea in abatement, alleging that plaintiff, a New York corporation, was dissolved ten years prior to the commencement of this action and that plaintiff was without legal capacity to institute or maintain the suit (Apt. App. 4-12). A demurrer to the plea in abatement was sustained (Apt. App. 15). At the trial no breach of contract prior to plaintiff's dissolution was claimed. The jury returned a verdict in Stentor's favor for $100,000.00.

Six days after judgment was entered on the verdict plaintiff moved to correct the judgment by adding interest at the rate of 6% from the date of institution of suit (Apt. App. 44).

This was the first time that the question of interest was raised. The contract contained no provision for interest and no request for an instruction to the jury regarding interest had been made at the trial. Inasmuch as the verdict was for only a fraction of the *ad damnum*, it was impossible to determine whether or not the jury included interest in the verdict as rendered.

The stated basis for the motion for interest was Section 480 of the New York Civil Practice Act, which provides:

> "• • • In every action wherein any sum of money shall be awarded by verdict, report or decision upon a cause of action for the enforcement of or based upon

plied, interest shall be recovered upon the principal sum whether theretofore liquidated or unliquidated and shall be added to and be a part of the total sum awarded."

The Court granted the motion, adding $60,821.92 to the judgment as originally entered (Apt. App. 68). The Circuit Court of Appeals, while conceding the difficulty of the interest question, concluded that Section 480 governed because (1) New York was the place of performance of the contract, (2) "the matter of recovery of interest and the rate thereof is a matter of substance" and (3) therefore is governed by the law of the place of performance.

Plaintiff attempted to prove damages for Klaxon's alleged failure to keep the covenant "to use its best efforts" to exploit assigned patents. Plaintiff claimed that patented devices assigned were useful on the earphone and horn type of radio receivers, and that Klaxon, whose business was the manufacture of signalling devices for the automotive industry, should have entered the radio field. Plaintiff introduced, over objection, census figures showing the total number of radio receivers of all types sold in the United States during the years 1923, 1925 and 1927. Hollister, a New York stock broker and president of the plaintiff at the time of the dissolution, was allowed over proper objection (Apt. App. 86) to testify:

> "There were manufactured in the census years 1923, 1925 and 1927, just under 10,000,000 receiver units for use in radio according to the census figures. Making an estimate for the unreported years, for 1922, 1924 and 1926 of the same total, we have, an aggregate for these six years, 1922 to 1927, inclusive, of 20,000,000 such receiver units for use in radio" (Apt. App. 92).
>
> "There was a ready market for them at such prices as to show a net profit of not less than one dollar apiece for them to the Klaxon Company" (Apt. App. 93).

"That represents in these six years a business in these receiver units in radio alone of $40,000,000 and a profit of $20,000,000. I am assuming that Klaxon would have obtained during these six years only one-tenth of that business. That would have been a profit of $2,000,000 for Klaxon, of which Stentor's share would have been $1,000,000" (Apt. App. 94).

The census figures to which Hollister referred included cone, dynamic, head-phone and horn types of receivers. The patents in suit did not cover cone or dynamic types. The Court permitted Hollister not only to guess the total number of receivers sold for the three unreported census years, 1922, 1924 and 1926, but also to guess that Klaxon would have sold ten per cent of the total if it had used its best efforts in exploiting the patents in a field that was unknown when the contract was made and when plaintiff was dissolved. There was not even a basis for a guess as to the number of speakers sold of the head-phone and horn type covered by the patents in question.

## Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

(1) In sustaining the District Judge's addition of $60,821.92 interest to the verdict.

(2) In retaining jurisdiction of a cause of action by a dissolved New York corporation suing as a "citizen" for damages for a breach of contract that occurred years after dissolution.

(3) In upholding the admission of "pretty highly speculative" testimony, to use the phrase of the Circuit Court, based on census figures.

(4) In affirming the judgment of the District Court of the United States for the District of Delaware.

## Reasons for Granting the Writ.

### I.

### The Circuit Court of Appeals decision is at war with decisions of other Circuit Courts of Appeals on the question of interest.

(a)

As above stated, the decision of the court below was arrived at on the ground that "the matter of recovery of interest and the rate thereof is a matter of substance" and governed by the law of the place of performance (115 (2d) 268, 276). However, the Courts of Appeals for the First and Ninth Circuits have rejected this view and instead hold the *lex fori* to be controlling. *Mather* v. *Stokely*, 218 Fed. 764 (C. C. A. 1); *Butte A. & P. Ry. Co.* v. *United States*, 61 Fed. (2d) 587 (C. C. A. 9).

The *Mather* case was an action instituted in the Massachusetts Federal District Court on covenants in a warranty deed of lands in Florida. The question arose whether interest from the date payment was made for the deed should run at the Florida rate or at the Massachusetts rate. The trial court charged the jury to add interest to its verdict at the Florida rate. Reversing the judgment below, the Circuit Court of Appeals held:

> "According to the rules of law in the federal courts, the rate of interest under these circumstances is fixed by the law of the forum, which is, in this case, only 6 per cent. per annum. *Goddard* v. *Foster*, 17 Wall. 123, 143, 21 L. Ed. 589. The plaintiff, now the defendant in error, relies on several decisions of the Supreme Court which she cites to us. While these decisions recognize special circumstances, for example, cases of obligations which stipulate for a special rate of interest, and cases of coupons which are expressly made payable at a specific place, yet, as a whole, they recognize the rule here stated."

In the *Butte* case the Court held, at page 591:

> "• • • Where interest is allowed, it is at the legal rate fixed by the law of the forum. *Mather v. Stokely*, 218 F. 764 (C. C. A. 1). • • • See, also, *The Leonie O. Louise*, 4 Fed. (2d) 699 (C. C. A. 5). Decisions of District Judges to the same effect in cases in which the United States was the plaintiff, are *United States* v. *Pan-American Petroleum Company*, 24 F. (2d) 206; *United States* v. *Skinner & Eddy Corp.*, 28 F. (2d) 373; *Jones Company* v. *Canadian Nat. Ry. Co.*, 14 F. (2d) 852."

In view of the widely divergent rules and statutes governing the matter of the recovery of interest and the rate thereof, it is essential that the federal courts have a uniform choice-of-law rule regarding interest. Certiorari should therefore issue to resolve the conflict between the decision below and the *Butte* and *Mather* cases.

(b)

As the Court below recognized, the principal damages awarded in this case were highly uncertain both as to the amount due and the date when due. In *Jones* v. *Foster*, 70 Fed. (2d) 200, the Circuit Court of Appeals for the Fourth Circuit recently held that under such circumstances the award of interest is in the discretion of the jury and cannot be added by the judge.

The *Jones* case was an action for a balance due under an agreement to purchase stock. The court held, at page 207:

> "• • • Considering all the factors of uncertainty with regard to the exact amount of the plaintiff's claim due on the final accounting, we do not think it can be said that it was of such a nature that he was entitled to interest on the balance due as a matter of law as of the certain date of March 9, 1931. In our view the case falls properly into the *category where interest is allowable by the trier of facts (in*

*this case the jury) as a matter of discretion and was not to be determined by the judge as a matter of law.* Williston on Contracts, Vol. 3, Sec. 1413; 17 C. J. 815; 37 C. J. 1263, 1264; 39 Cyc. 836; 3 A. L. R. 809; *Stephens* v. *Phoenix Bridge Co.* (C. C. A. 2), 139 F. 248, 250.

"We are not dealing with a case where interest was expressly contracted for as in an agreement to pay a certain sum on a certain date with interest, or where a sum certain is otherwise definitely due and payable on a certain date to which interest attaches ordinarily from maturity by implication. On the contrary we have here a case where neither the amount due nor the date when due is fixed and certain. *In such a case interest in the nature of damages is to be allowed or not in the discretion of the trier of facts. We think it cannot be said that it was absolutely necessary to allow interest in this case in order to arrive at fair compensation to the plaintiff.* There were undoubtedly features in the case which might well have induced the exercise of discretion by the jury to allow interest to the plaintiff, especially the defendant's quite unjustifiable delay in making the final accounting. But on the other hand the jury decided what was at least a very debatable issue in favor of the plaintiff involving the allowance of a sum much larger in amount than the item of interest here involved, and we cannot say that the defendant's contentions as to other deductions were so palpably unreasonable as to have been advanced in bad faith. *We, therefore, conclude that the jury should have been instructed in this case that interest was to be allowed or not in their discretion.*" (All italics by counsel.)

The Court of Appeals accordingly directed that the interest which had been added by the judge be remitted. In refusing to order a remission in the case at bar, the Third Circuit has produced a conflict with its neighboring circuit on an exceedingly practical point of law which may be expected to recur with great frequency in the trial of contract actions in the federal courts.

(c)

It is the rule of many courts in this country that the plaintiff, by failing to ask that a jury be instructed regarding interest, waives his right to interest. This rule was recently applied in the Circuit Court of Appeals for the Second Circuit in *Companhia de Navegacao Lloyd Brasileiro* v. *C. G. Blake Co.*, 34 Fed. (2d) 616, an action for breach of a sales contract, wherein the plaintiff-buyer demanded interest in its complaint but failed to request an instruction on interest. It was held, per L. Hand, *J.*:

> "The buyer's appeal from the Judge's refusal to allow interest must be denied. The case was one in which the jury might have allowed interest, but the buyer made no such request and the record does not therefore raise the point. The court had no power to add interest to the verdict and the request came too late."

The rule applied in the *Companhia* case is not a mere technical waiver of the sort that Rule 60(a)* of the new Rules of Civil Procedure was designed to eliminate. On the contrary, it has a sound, practical *raison d'être*. In its absence, unscrupulous counsel are at liberty to gamble for a double recovery of interest, relying on the fact

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* In this connection it should be noted that neither of the new Rules of Civil Procedure relied on by the court below as authority for this motion warrants the relief granted.

Rule 54(c) obviously has nothing to do with amendments of verdicts or judgments. Its effect is to enable the court to grant relief not demanded in the pleadings; but there is no such issue in this case. Plaintiff's original pleadings contained no reference to interest, but plaintiff's *final* complaint demanded interest.

Rule 60(a), as is obvious on its face, "deals with clerical mistakes." See Moore, Federal Practice, Section 60.01. It "introduces nothing new in federal practice." 2 Edmunds, Federal Rules of Civil Procedure, page 1503; Proceedings, New York and Washington Institutes on New Federal Rules, page 185. And the omission from a judgment of a provision for interest is not a "clerical mistake," at least where, as in the present case, there is a serious question as to plaintiff's right to interest. *Reed* v. *Howbert*, 77 Fed. (2d) 227, 229 (C. C. A. 10).

that juries often allow interest in their verdicts although not instructed to do so. See, *e. g., Farish* v. *Madison Distributing Co.*, 37 Fed. (2d) 455 (C. C. A. 2); *Biederman* v. *Interstate Trust & Banking Company*, 154 S. W. 843 (Mo. App.); *Wilson & Co.* v. *Atlanta R. R. Co.*, 16 S. C. 587. If a plaintiff can, with impunity, defer all reference to interest until after the verdict is rendered and the jury has dispersed, he will often succeed in obtaining two awards of interest, one by the jury and one by the judge.

By not requesting the court to instruct the jury regarding interest, the plaintiff placed itself in a position where it might obtain a double recovery of interest should the Court rule in its favor on a motion to add interest. Speculation of this sort is not to be tolerated. The rule of the *Companhia* case, which the court below and the trial court refused to apply, prevents such speculation.

## II.

THE CIRCUIT COURT OF APPEALS DECISION REGARDING INTEREST RUNS COUNTER TO A RECENT DECISION OF THIS COURT.

In *Funkhouser* v. *J. B. Preston Company*, 290 U. S. 163, this Court, by Chief Justice Hughes, said with reference to Section 480 of the New York Civil Practice Act:

> "The statute in question concerns the *remedy* and does not disturb the obligations of the contract. • • • The ascertainment of that loss *and of what would constitute full compensation* was a matter of *procedure* within the range of due process in the enforcement of the contract. 'To enact laws providing *remedies* for a violation of contracts' and 'to alter or enlarge those *remedies* from time to time' was within the competency of the legislature."

Despite the above quoted holding, which is reiterated elsewhere in the *Funkhouser* opinion, the Court below held that the *Funkhouser* case did not help it to decide

whether Section 480 of the New York Civil Practice Act was substantive or procedural!

Granting that the precise question presented by this case was not before the Court in the *Funkhouser* case, nevertheless both decisions depended on the determination whether the statute in question was substantive or procedural. The Court below lightly dismissed the considered pronouncement of this Court that Section 480, N. Y. C. P. A., is procedural. To justify the departure the Court below cited no controlling authority but relied only on the remote analogy that interest "seems as substantial an item as, for example, loss of time in a personal injury action."

Recent developments in the federal law, such as the decision in the case of *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, and the adoption of the new Rules of Civil Procedure, make it of paramount importance that the distinction between substantive law and procedure be made clear and kept clear. The decision of the Court below that a particular statute which the Supreme Court has held to be procedural is nevertheless substantive for conflict of laws purposes cannot fail to produce confusion in the minds of the Bar and the lower federal courts. Such refinements should not be created except under compulsion of Congressional enactment or Supreme Court authority. Such compulsion is entirely lacking in this case.

## III.

THE CIRCUIT COURT OF APPEALS DECISION, IF UNREVERSED, MAKES DOUBTFUL THE CONSTITUTIONALITY OF A FEDERAL STATUTE AND IMPUGNS A DECISION OF THIS COURT.

Mr. Justice Brandeis said in *Erie* v. *Tompkins*, 304 U. S. 64, at page 78:

> "Congress has no power to declare substantive rules of common law applicable in a state whether they be

> local in their nature or 'general', be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

If the Court below is right in its conclusion that the recovery of interest is a matter of substantive law, it follows that Congress is without power to legislate in this field and no federal court could prescribe that any law other than the law governing the substantive rights of the parties should determine the recovery of interest. Yet Congress has passed such a law and the Supreme Court has rendered such a decision.

Section 966 of the Revised Statutes (28 U. S. C. A., Section 811) provides:

> "Interest shall be allowed on all judgments in civil causes, recovered in a district court, and may be levied by the marshal under process of execution issued thereon, in all cases where, by the law of the State in which such court is held, interest may be levied under process of execution on judgments recovered in the courts of such State; and it shall be calculated from the date of the judgment, at such rate as is allowed by law on judgments recovered in the courts of such State."

In *Massachusetts Benefit Ass'n* v. *Miles*, 137 U. S. 689, the right to recover interest was held to be governed by the *lex fori*. The action was in a Federal Court in Pennsylvania upon a contract of life insurance. It does not appear where the contract was made. A Pennsylvania statute allowed interest from the date of verdict. Approving the application of this statute by the trial court, the Supreme Court held, at page 691:

> "The courts of the State *and the Federal courts sitting within the State* should be in harmony upon this point."

The fact that Section 966 has to do with interest from the date of judgment and the *Massachusetts Benefit* case

has to do with interest from the date of verdict, whereas the case at bar involves interest from the date of writ, is plainly immaterial. All three are variants of interest *ex mora* and the power of Congress and of the Supreme Court with respect to all must be identical. If the allowance of one is a substantive matter, so must allowance of the others be a substantive matter. Accordingly, if the decision below that interest from the date of verdict is a substantive matter is correct, the *Massachusetts Benefit* case and R. S. 966 are unconstitutional under the doctrine of *Erie* v. *Tompkins*.

Denial of this petition would not only perpetuate existing confusion as to the law governing allowance of interest prior to judgment, but would produce equally intolerable confusion as to the law governing allowance of the other types of moratory interest in the federal courts.

## IV.

THE DECISION BELOW IS AN UNWARRANTED EXTENSION OF THE DIVERSITY JURISDICTION IN FAVOR OF CORPORATIONS.

The Court below, in holding that a dissolved corporation is a citizen within the meaning of the Judicial Code and may sue as a corporation in the United States Courts ten years after its dissolution on a cause of action that did not exist at the time of dissolution, has decided an important question of Federal law which has not been, but should be, settled by this Court. The question goes to the jurisdiction of the District Court, for if there was no "citizen" plaintiff, there was no diversity of citizenship.

Under the New York statute, upon filing of a consent to dissolution, "such corporation shall be dissolved and shall cease to carry on business, except for the purpose of adjusting and winding up its business" (Sec. 2). It continues "in existence for the purpose of paying, satisfying and discharging any *existing* debts or obligations,

collecting and distributing its assets and doing all other acts required in order to adjust and *wind up* its business and affairs, and may sue and be sued for the purpose of enforcing *such* debts or obligations, until its business and affairs are fully adjusted and wound up" (Sec. 3).

The New York Appellate Division (2d Department) has held that a cause of action cannot be said to have been created in favor of a corporation which has passed out of existence before the cause of action came into being. *Kinney* v. *Reid Ice Cream Co.*, 57 App. Div. 206, 209 (1901).

It is one thing for the State of New York to provide that a dissolved corporation may sue and be sued for the purpose of winding up its affairs; it is a wholly different thing to hold that such continuance of the corporate status for purposes of self-interment, continues it also for the purposes of subsequent injury and damages, and suits thereon as though no dissolution had occurred.

New York may accord to its dissolved corporations the right to sue in its courts, but it would seem to be without power to give them the status of live corporations in the Federal Courts under the reasoning of Mr. Justice Stone in *Nashville, Chattanooga, etc. Railway Co.* v. *Wallace*, 288 U. S. 249; *Great Southern Fireproof Hotel Company* v. *Jones*, 177 U. S. 449.

## V.

THE USE OF CENSUS FIGURES AS SANCTIONED BY THE COURT BELOW MARKS A DEPARTURE IN METHODS OF PROOF WHICH SHOULD BE REVIEWED BY THIS COURT.

Census figures were used below to prove the potential sales of a particular factory in the radio speaker field. The figures were but a compilation of all sales in that

field. Logic demonstrates that such figures are not probative of the actual sales of a particular factory included in the general compilation; much less do they have any probative value to establish the potential sales of a particular factory. (See Wigmore on Evidence, 3d Ed., Vol. 5, Sec. 1671.)

Unless restrained by this Court such a use of census reports will prove fruitful soil for speculative litigation.

## Conclusion.

It is therefore respectfully submitted that for the reasons stated this petition for a writ of certiorari should be granted.

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# Appendix.

## I

### Judicial Code

Section 24 (U. S. Code, Title 28, Section 41):

"The District Courts shall have original jurisdiction as follows: First of all suits of a civil nature at common law or in equity brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and * * * (B) is between citizens of different States."

## II

### New York Corporation Law

[Italics by counsel.]

"An Act Relating to Corporations Generally, Constituting Chapter Twenty-three of the Consolidated Laws" [now Sec. 105 of Stock Corporation Law].

"Sec. 221. Dissolution of stock corporation before expiration of time limit.—Any stock corporation, except a moneyed or a railroad corporation, may be dissolved before the expiration of the time limited in its certificate of incorporation or in its charter as follows:

"1. The board of directors of any such corporation may at a meeting called for that purpose, upon at least three days' notice to each director, by a vote of a majority of the whole board, adopt a resolution that it is in their opinion advisable to dissolve such corporation forthwith, and thereupon shall call a meeting of the stockholders for the purpose of voting upon a proposition that such corporation *be forthwith dis-*

*solved.* Such meeting of the stockholders shall be held not less than thirty nor more than sixty days after the adoption of such resolution, and the notice of the time and place of such meeting so called by the directors shall be published in one or more newspapers published and circulating in the county wherein such corporation has its principal office, at least once a week for three weeks successively next preceding the time appointed for holding such meeting, and on or before the day of the first publication of such notice, a copy thereof shall be served personally on each stockholder, or mailed to him at his last known post-office address. Such meeting shall be held in the city, town or village in which the last preceding annual meeting of the corporation was held and said meeting may, on the day so appointed, by the consent of a majority in interest of the stockholders present, be adjourned from time to time, and notice of such adjournment shall be published in the newspapers in which the notice of the meeting is published. If at any such meeting the holders of two-thirds in amount of the stock of the corporation, then outstanding, shall, in person or by attorney, consent that such dissolution shall take place and signify such consent, in writing, then such corporation shall file such consent, attested by its secretary or treasurer, and its president or vice-president, together with the powers of attorney signed by such stockholders executing such consent by attorney, with a statement of the names and residences of the then existing board of directors of said corporation, and the names and residences of its officers duly verified by the secretary or treasurer or president of said corporation, in the office of the secretary of state.

"2. The secretary of state shall thereupon issue to such corporation, in duplicate, a certificate of the filing of such papers and that it appears therefrom that such corporation has complied with this section in order to be dissolved and one of such duplicate certificates shall be filed by such corporation in the office of the clerk of the county in which such corporation has its principal office; *and thereupon such corporation shall be dissolved and shall cease to carry on business, except for the purpose of adjusting and*

*winding up its business.* The board of directors shall cause a copy of such certificate to be published at least once a week for two weeks in one or more newspapers published and circulating in the county in which the principal office of such corporation is located, and at the expiration of such publication, the said corporation by its board of directors shall proceed to adjust and wind up its business and affairs with power to carry out its contracts and to sell its assets at public or private sale, and to apply the same in discharge of debts and obligations of such corporation, and, after paying and adequately providing for the payment of such debts and obligations, to distribute the balance of assets among stockholders of said corporation, according to their respective rights and interests.

"3. Said corporation shall nevertheless continue in existence for the purpose of paying, satisfying and discharging *any existing debts or obligations, collecting and distributing its assets* and doing all other acts required *in order to adjust and wind up its business and affairs,* and may sue and be sued *for the purpose of enforcing such debts* or obligations, *until its business and affairs are fully adjusted and wound up.*

"4. After paying or adequately providing for the debts and obligations of the corporation the directors may, with the written consent of the holders of two-thirds in amount of the capital stock, sell the remaining assets or any part thereof to a corporation organized under the laws of this or any other state, and engaged in a business of the same general character, and take in payment therefor the stock or bonds or both of such corporation and distribute them among the stockholders, in lieu of money, in proportion to their interests therein, but no such sale shall be valid as against any stockholder who, within sixty days after the mailing of notice to him of such sale, shall apply to the supreme court in the manner provided by section seventeen of the stock corporation law, for an appraisal of the value of his interests in the assets so sold; unless within thirty days after such appraisal the stockholders consenting to such sale, or some of them, shall pay to such objecting stockholder or deposit for his account, in the manner

directed by the court, the amount of such appraisal and upon such payment or deposit the interest of such objecting stockholder shall vest in the person or persons making such payment or deposit."

## III

### New York Civil Practice Act

Section 1 of the New York Civil Practice Act provides:

"This act shall be known as the Civil Practice Act, and, except as otherwise expressly provided, shall apply to the civil practice in all the courts of record of the state."

Section 480 provides:

"Interest to Be Included in Recovery. Where in any action, except as provided in section four hundred eighty-a, final judgment is rendered for a sum of money awarded by a verdict, report or decision, interest upon the total amount awarded, from the time when the verdict was rendered or the report or decision was made to the time of entering judgment, must be computed by the clerk, added to the total amount awarded, and included in the amount of the judgment. In every action wherein any sum of money shall be awarded by verdict, report or decision upon a cause of action for the enforcement of or based upon breach of performance of a contract, express or implied, interest shall be recovered upon the principal sum whether theretofore liquidated or unliquidated and shall be added to and be a part of the total sum awarded."

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